United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-6156

UNITED STATES COURT of APPEALS

FOR THE SECOND CIRCUIT

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SAMUEL M. KAYNARD, REGIONAL DIRECTOR OF REGION 29 OF THE NATIONAL LABOR RELATIONS BOARD, FOR AN ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD

Petitioner-Appellant,

P/S

v.

JOINT INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY AND PENSION COMMITTEE, JOINT INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY, AND TRUSTEES OF THE PENSION HOSPITALIZATION AND BENEFIT PLAN OF THE ELECTRICAL INDUSTRY, AS NAMED IN APPENDIX A,

Respondent-Appellee.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR PETITIONER-APPELLANT

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NO. 76-6156

UNITED STATES COURT OF APPEALS
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BRIEF FOR PETITIONER-APPELLANT

I. STATEMENT OF THE ISSUE

Whether, after finding reasonable cause to believe the employer violated Section 8(a)(1), (3) and (5) of the Act, the court below committed reversible error by failing to provide an affirmative order under Section 10(j) of the Act requiring the employer, pending the Board's final determination of the

unfair labor practice charge, to: restore, reopen and operate its Flushing, New York dental clinic; offer to all its dentists and other employees formerly employed at its dental clinic immediate and full reinstatement to their former positions; and recognize and bargain upon request with the Union.

II. STATEMENT OF THE CASE

This is an appeal from an order of the United States District Court for the Eastern District of New York, per Judge Jack B. Weinstein, denying, in part, a petition for a temporary injunction filed on behalf of the National Labor Relations Board (herein "the Board") by Samuel M. Kaynard, Regional Director of the Board's Twenty-ninth Region (herein "the Regional Director"), Petitioner-Appellant, pursuant to Section 10(j) of the National Labor Relations Act, as amended (61 Stat. 149; 73 Stat. 544; 29 U.S.C. 160(j), hereinafter referred to as "the Act").[1/] The order of the Court below was entered on September 24, 1976 (A. 37-38).[2/]

The Board has appealed from the injunction order only insofar as it fails to direct, pending the Board's final disposition of the underlying unfair labor practice charges, the Joint Industry Board of the Electrical Industry and Pension Committee, Joint Industry Board of the Electrical Industry, and Trustees of the Pension Hospitalization and Benefit Plan of the Electrical Industry, the Respondent-Appellee (herein "the Joint Board"), to restore,

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1/ The relevant statutory provisions are reprinted as an addendum to this brief, infra, pp. 31-32.

2/ "A" references are to the joint appendices accompanying the briefs. The appendices are in two volumes and are numbered consecutively.

reopen, and operate its Flushing, New York dental clinic on the same basis as it had previously operated said clinic; to offer to all its dentists and other employees formerly employed at its dental clinic as of April 29, 1976, immediate and full reinstatement to their former positions of employement; and to recognize and bargain collectively with Local 277, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein "the Union"), upon request, as the exclusive collective bargaining representative of the dentists employed by the Joint Board at its dental clinic.

Jurisdiction of this Court is invoked under Section 1291 and 1292 of Title 28 of the United States Code.

A. The Proceedings Below

The petition for an injunction filed with the district court on August 10, 1976 was based on a charge filed with the Board's Regional Director on May 5, 1976, and amended on May 27, 1976, by the Union alleging that the Joint Board had engaged in, and was engaging in, unfair labor practices within the meaning of Section 8(a)(1), (3) and (5) of the Act, which make it unlawful for an employer to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed them in Section 7 of the Act, to discriminate in regard to hire or tenure of employment or any terms or conditions of employment to discourage membership in any labor organization, and to refuse to bargain collectively with the designated representatives of its employees, respectively.

Following investigation of the charge, the Regional Director concluded that the Joint Board was engaging in the unfair labor practices charged and that a complaint should issue. An 8(a)(1), (3) and (5) complaint issued on June 7, 1976 (Board Case No. 29-CA-4989), and a hearing was held before Admini-

strative Law Judge Max Rosenberg on July 19, 20, 21 and 23, 1976. Judge Rosenberg has not yet issued his decision.

On August 10, 1976, the Regional Director filed with the court below a petition for temporary injunction, pursuant to Section 10(j) of the Act. The same day, a hearing was held before district court Judge Jack B. Weinstein. The parties stipulated that the record of the proceedings in the court below would consist primarily of the transcript and exhibits of the hearing before the Administrative Law Judge (A. 17-18). In addition, the Joint Board presented additional evidence before the court below. Thereafter, the court below entered an order granting certain injunctive relief, but rejected the Regional Director's request for an interim reinstatement and bargaining order.

B. Statement of the Facts

The evidence adduced in the hearing before the Board's Administrative Law Judge and stipulated to the court below, as well as other evidence presented to the court below, may be summarized as follows:

1. Background

The Joint Board, an integrated enterprise for the purpose of this Act, was created pursuant to collective bargaining agreements by and between Local 3, International Brotherhood of Electrical Workers (herein "Local 3") and various electrical contractor employer associations and independent electrical contractors (A. 42, 45-46, 375-376). The Joint Board has its offices in the same building which serves as office and headquarters for Local 3 (A. 104-105). On the second floor of this building, the Pension Committee of the Joint Board operates a medical and dental clinic (A. 104, 141-142, 193). In addition to the dental and medical clinic, the Pension Committee administers policies

covering surgical benefits, major medical benefits, hospitalization benefits, and pensions, and operates a rest home called Bayberryland (A. 256-257). Funds to operate the benefits are administered by the Pension Committee of the Joint Board (A. 256-257). The Joint Board obtains its operating funds through payments from the contracting employers and associations based on a percentage of the gross salary of the men working under the collective bargaining agreements (A. 264).

All benefits administered by the Pension Committee, including the medical and dental clinic, are the responsibility of Joseph D'Angelo, Director of Administration of the Pension Committee (A. 256). The director of the dental clinic is Dr. Sidney Krauss (A. 87, 105, 153, 435). Both D'Angelo and Krauss are supervisors within the meaning of Section 2(11) of the Act (A. 507). Dr. Paul Brunetto is assistant to the director of the dental clinic (A. 50, 137). His duties included, inter alia, making the diagnosis and decision as to each patient's treatment (other than fillings), assigning patients to dentists, handling patient complaints, and passing along instructions from Dr. Krauss to the dentists (A. 106-109, 137-141, 192-193).

The dental clinic has been in existence for over 20 years and serviced approximately 8,000 patients annually (A. 432-433). As of March 15, 1976 and thru April 29, 1976, the Joint Board employed 30 dentists[3/] and a number of clerical employees in the dental clinic (A. 364-365). All clerical employees, including those employed in the dental clinic, were represented by a labor

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3/ This figure does not include the assistant to the director, Dr. Brunetto.

organization not affiliated with Local 3 (A. 55, 356). The doctors employed in the medical clinic are not represented by any labor organization (A. 395).

2 The Union organizes the dentists, obtains authorization cards from a majority of these employees, and requests recognition

As a result of anonymous telephone calls by two dentists, Drs. Gus Goldberg and Joseph Vierno (A. 112-113, 194-195), several dentists met on March 5, 1976 with Anthony Distinte, president and business representative of the Union (A. 65, 115-116, 195).[4/] At this meeting, Distinte explained union organizing procedures to the dentists and, in general, discussed the functions of unions (A. 65-66, 115-116).

On March 14, 1976, a second union meeting was held which was attended by 16 dentists (A. 66, 116-118, 196). At the meeting, Distinte discussed the background of the Union and the procedures for organizing (A. 66). Distinte told the dentists that the Union needed signed authorization cards from a majority of the dentists before it could proceed any further (A. 67). Distinte explained that he would distribute union authorization cards to be completed and signed by the dentists and that if he received a majority of signed cards he would seek voluntary recognition and, if he failed to obtain voluntary recognition, he would file a petition with the Board for a representation election (A. 68).

4/ In addition to Drs. Goldberg and Vierno, Drs. Robert Kramer and John Warren attended this meeting (A. 115, 195, 217).

All 16 dentists present at the March 14th meeting signed cards (A. 66-68, 118-120, 196-203, 523-533).[5/] In addition, four other authorization cards were subsequently obtained by the Union (A. 62-63, 521-522).[6/]

On March 15, 1976, the Union sent a telegram to the Joint Board requesting recognition and bargaining with respect to a unit consisting of all dentists employed in the dental clinic (A. 73-74, 361, 446, 534-535). Thereafter, the Joint Board refused to recognize and bargain with the Union (A. 76-78, 362).[7/]

3. Joint Board embarks on a counter-campaign which culminates in closing of the dental clinic

On March 15, following the Joint Board's receipt of the Union's telegram, dental clinic director Krauss encountered dentist Gus Goldberg in the hallway and admittedly[8/] asked Goldberg "Do you know who are involved in this union bit?" (A. 120-121, 446-447, 494).[9/] Goldberg untruthfully stated that he had heard rumors that someone from the outside had contacted the Teamsters (A. 121-124).

In light of the Joint Board's refusal to accord voluntary recognition, on March 17, 1976, the Union filed with the Board a petition for an election (A. 77).

5/ One of the 16 dentists, Dr. Joseph Alcalay, inadvertently inserted the date March 15 on his authorization card rather than the correct date of March 14 (A. 60-63).

6/ Another authorization card was obtained from a dentist who has since died (A. 70-71).

7/ Several years previously, the dentists had selected an independent union to represent them for purposes of collective bargaining. A strike had ensued to force the Joint Board to recognize and bargain with the union. The strike failed and the dentists abandoned the union (A. 91-93).

8/ Except as otherwise noted, the Joint Board denied that anti-union statements or conduct were engaged in by its supervisors or agents.

9/ Dr. Krauss also asked Dr. Brunetto, assistant to the director of the dental clinic, the same question (A. 446-447).

On April 1, director of administration D'Angelo, with Dr. Krauss present, admittedly addressed a meeting of all the dentists working that day (A. 148-149, 170-171, 204-205, 217, 425). During the course of this meeting, D'Angelo informed the dentists that he was aware of their "outside activities" and warned the dentists against "injuring" or "mistreating" the patients (A. 149, 171-172, 205, 218). There had never been any prior meetings where the subject of injuring patients was ever mentioned (A. 125, 150, 208-209).

During the month of April, Dr. Brunetto on several occasions told dentists that "Since you fellows have joined the Union Dr. Krauss is very busy checking the records very carefully and making notations, so would you please be careful -- extra careful, even for technical matters, because the records, since you joined the union, have been checked very carefully, more so than the usual routine." (A. 152-154).

Thereafter, Dr. Krauss berated dentist Joseph Vierno for permitting a patient to leave upon Vierno's completion of a filling in 17 minutes rather than keeping him for his full 20-minute time allotment (A. 209-210). It had been the accepted practice for dentists in the Operative Department to allow their patients to leave upon completion of their work (A. 211).

On April 21, the Regional Director for Region 29 issued a Decision and Direction of Election, directing an election to be held among the dentists on May 21 (A. 508-512).[10/]

Around April 22, Dr. Krauss assembled a group of dentists from the Operative Department and told them he had been checking the records and had

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10/ The Joint Board filed a request for review of this decision with the Board on April 26 (A. 513-515). On May 13, the request was denied by the Board (A. 516).

found an unusually large number of fillings falling out and he attributed this to deliberate "sabotage" by the dentists (A. 150-152, 218-220). Sometime during the last week in April, Dr. Krauss accused dentist Theodore Eiges of inserting an improper filling and ordered him to redo the filling (A. 225-226). Before replacing the filling, Eiges requested two other dentists to check the filling and both concluded that it was proper (A. 226-227).

Around April 23, Dr. Krauss called dentists Gus Goldberg and Sidney Calem into his office and told them that dentist Manford had engaged in a "malicious act" by failing to send a patient's partial denture to the dental lab and threatened to fire Manford (A. 126-128, 183-184).[11/] Drs. Goldberg and Calem protested that any mistake by Dr. Manford must have been unintentional, but Dr. Krauss remained adamant (A. 127-128, 185). While they were discussing this, Dr. Krauss received a telephone call from the dental lab informing him that the partial denture had been found (A. 128).

During the same conversation, Dr. Krauss asked Dr. Calem "how the hell you didn't tell me that these guys were forming a union?" (A. 128, 188-189).[12/] Dr. Krauss also complained that he had been "stripped of my powers upstairs because they said to me how come someone as astute as you with 30 men let a union be formed under your very nose" (A. 129, 187-189). He further indicated that he considered the dentists' decision to join a union to be a "personal vendetta" against him (A. 186-187, 491-492).

11/ Dr. Goldberg testified, apparently inadvertently, that Dr. Corliss rather than Dr. Calem was the other dentist present at this meeting.

12/ Dr. Goldberg inadvertently refers to Dr. Corliss rather than Dr. Calem.

Approximately one week before the closing of the dental clinic, Dr. Krauss admittedly asked dentist Alcalay whether he was "involved with those people" (A. 99-100, 493). Dr. Krauss also questioned Dr. Calem as to whether he was "one of the men that signed with the union?" (A. 182-183). Dr. Calem replied that he was not (A. 183).

4. The Joint Board suddenly closes the dental clinic and dismisses the dentists and most of the dental clerical employees

On April 29, D'Angelo and his father, the Chairman of the Joint Board, decided to close the dental clinic, effective April 30th (A. 335-336, 397-398). According to D'Angelo, the sole authority for the decision to close the dental clinic was a general direction that was given at the April 28th meeting of the Pension Committee to take steps to reduce the Joint Board's operating deficit (A. 409-410, 418-419). The official minutes of this meeting, however, do not contain any reference to such a direction (A. 420-421, 539-545). The abrupt decision to close the dental clinic was made without conducting a study as to the amount which would be saved by closing the dental clinic and without any determination as to how to proceed with the processing and treating of current patients (A. 400, 402, 413-415).

The dentists were not given any prior notice from management of the decision to close the dental clinic (A. 130-131, 155-156, 208, 212, 221-222, 394-395). Most of the dentists first learned of the closing on April 30 when they arrived and received their paychecks and they were not told of the reasons for the closing (A. 131, 154-155, 211-212, 220-221, 395). The clerical employees in the dental clinic, all but two of whom were terminated when the dental clinic closed, were first notified of the closing of the clinic at 9:00 a.m. on April 30, 1976 (A. 350-352, 395).

On May 1, Dr. Eiges arrived at the dental clinic, unaware that it had closed the previous day, and asked Dr. Krauss what had happened. Dr. Krauss responded "You fellows joined the Teamsters, now you go get jobs as truck drivers." (A. 229-232).

Approximately one week after the closing of the clinic, Dr. Ralph Corliss, at the request of some of the dentists, met with Dr. Krauss to determine whether there was a possibility that the dental clinic might reopen (A. 87-88). Dr. Krauss was pessimistic, saying that he felt that "negotiations between the Teamsters/and /the Union Joint Board/ would get nowhere." (A. 88). This conversation was relayed by Dr. Corliss to other dentists (A. 90-91). During a subsequent conversation, Dr. Krauss again told Dr. Corliss that negotiations with the Union would not be successful (A. 90). Dr. Krauss also indicated that the dentists would have made a better choice if they had selected an AFL-CIO union (Ibid).

Following the closing of the dental clinic, Dr. Krauss continued treating those patients who had been partially treated in prosthetics and crown and bridge work prior to the closing (A. 314-315, 336-338). As of the date of the hearing before the Administrative Law Judge, Dr. Krauss had not finished treating these patients (A. 315, 337). The Joint Board continued to provide all other benefits administered by the Pension Committee, including the medical clinic (A. 27, 142, 377, 379, 391). However, the Pension Committee has taken steps to alter the payment of money for hospitalization (A. 22-25). In addition, the vacation benefit, which is not under the Pension Committee, has been reduced (A. 301-302, 327-329).

On May 21, the election ordered pursuant to the Decision and Direction of Election took place (A. 53, 81). The Joint Board challenged the ballots of

all voters so that all ballots were impounded, and thereafter it filed objections to the election (A. 53, 81-82). Prior to any investigation of the challenges and objections, the Union requested permission to withdraw its petition and an order approving the withdrawal, with prejudice, issued on July 2 (A. 53, 518-520).

C. The District Court's Conclusions and Order

On the entire record, the court below found that the Regional Director had reasonable cause to believe that the Joint Board had engaged in conduct violative of Section 8(a)(1), (3) and (5) of the Act, as alleged in the petition for an injunction (A. 37).

However, the district court declined to issue an order requiring the Joint Board to reopen the dental clinic, to reinstate the discharged employees, and to recognize and bargain, upon demand, with the Union. Rather, the court issued an order enjoining and restraining the Joint Board from disposing of any assets of the dental clinic and from providing dental services, either directly or indirectly, for members or families of members of Local 3. In addition, the court ordered the Joint Board to preserve the dental clinic facility and all dental equipment in complete and proper working order and to set aside $1,000,000 to be applied as back pay in the event of a Board Order requiring the Joint Board to provide for back pay (A. 37-38).

We will show below that the district court applied an erroneous standard in determining the appropriate preliminary injunctive order, and committed reversible error by failing to grant the interim relief requested.

ARGUMENT

I. THE STATUTORY SCHEME UNDER WHICH TEMPORARY RELIEF WAS SOUGHT

The Act empowers the Board, upon filing of appropriate charges, to issue, hear, and determine complaints that employers or labor organizations have engaged in unfair labor practices within the meaning of the Act (Sections 10(a), (b) and (c) of the Act). However, a Board Decision and Order is not self-enforcing, and no sanctions attach until the order is enforced after review by a court of appeals under Section 10(e) or (f) of the Act. While Sections 10(e) and (f) empowered the Board to seek interim injunctive relief from the appropriate circuit court pending the court's review of the Board's final order, prior to the 1947 Amendments to the Act there was no provision for injunctive relief pending the Board's decision of a case on its merits. However, by 1947, Congress recognized that the Board's proceedings often are protracted and time-consuming, and that any unfair labor practice, if left unchecked during the pendency of those proceedings, has the potential for creating serious and unjustified obstructions to the free flow of commerce inimical to the public welfare, and for doing irreparable injury to the policies and purposes of the Act. As explained in the Senate Report on the bill which became the Act (S. Rep. No. 105, 80th Cong., 1st Sess., p. 8, I Legislative History of the Labor Management Relations Act of 1947, 414, (G.P.O., 1948) (hereafter "Leg. Hist LMRA"):

> Time is usually of the essence in these matters, and consequently the relatively slow procedure of the Board hearing and order, followed many months later by an enforcing decree of the circuit court of appeals, falls short of achieving the desired objectives --the prompt elimination of the obstructions to the free flow of commerce and encouragement of the practice and procedure of free and private collective bargaining. Hence we have provided that the Board acting in the public interest and not in vindication of purely private rights, may seek injunctive relief in the case of all types of unfair labor practices . . . .

See also, I Leg. Hist LMRA, supra, at 433.

Accordingly, in order to prevent a frustration of the statutory purpose pending final disposition of the unfair labor practice charges pending before the Board, Congress provided in Section 10(j) of the Act:

> (j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

In short, Section 10(j) of the Act provides that after a complaint has issued alleging a violation of any Section of the Act, the Board may seek temporary injunctive relief in the appropriate United States district court in order to prevent a respondent from being able to completely frustrate the purposes and policies of the Act and to accomplish its illegal objectives before being placed under any legal restraint.

At the same time, in 1947, Congress enacted the companion provision, Section 10(l), providing for similar injunctions with respect to certain specified unfair labor practices such as secondary boycotts. The basic statutory schemes of Sections 10(j) and 10(l) differ in only one respect: 10(l) imposes on the Board a mandatory duty to seek appropriate injunctive relief whenever a complaint is to be issued alleging unfair labor practices covered by that Section, whereas 10(j) gives the Board discretion to seek injunctive relief when a complaint is issued involving other unfair labor practices. Danielson v. Joint Board of Coat, Suit & Allied Garment Workers'

Union, 494 F. 2d 1230, 1242 (C.A. 2, 1974); Boire v. Int'l. Brotherhood of Teamsters, et al., 479 F. 2d 778, 787, n. 7 (C.A. 5, 1973); Squillacote v. Local 248, Meat & Allied Food Workers, 534 F. 2d 735, 741-742 (C.A. 7, 1976). See Minnesota Mining & Mfg. Co. v. Meter, 385 F. 2d 265, 269, n. 5 (C.A. 8, 1967). The injunctive relief contemplated in both situations is interlocutory to the final disposition of the unfair labor practice matters pending before the Board and is limited to such time as may expire before the Board renders its final decision. Sears, Roebuck & Co. v. Carpet Layers, Local Union No. 419, AFL-CIO, et al., 397 U.S. 655, 658-659 (1970).

Under this statutory scheme, the issues before a district court in proceedings under Sections 10(j) and 10(l) are whether there is reasonable cause to believe that a violation of the Act, as charged, has been committed, and whether injunctive relief is "just and proper." Angle v. Sacks, 382 F. 2d 655, 661 (C.A. 10, 1967); Boire v. Int'l. Brotherhood of Teamsters, supra, 479 F. 2d at 787-789; Squillacote v. Local 248, Meat & Allied Food Workers, supra, 534 F. 2d at 743-744; Cf. McLeod v. General Electric Company, 87 S. Ct. 5,6 (1966).

Since the injunction proceeding under Section 10(j) of the Act is ancillary to the main unfair labor practice case, and since any injunction issued thereunder is interlocutory in nature and expires upon the Board's rendering its final decision, "it is well settled that the district court need not decide that an unfair labor practice has actually occurred but merely must decide whether the Board has reasonable cause to believe there has been a violation of the Act." Danielson v. International Organization of Masters, Mates and Pilots, AFL-CIO, 521 F. 2d 747, 751 (C.A. 2, 1975). Accord: Seeler v. Trading Port, Inc., 517 F. 2d 33, 36 (C.A. 2, 1975), and cases there cited.

This "reasonable cause" standard does not require the Board to adduce evidence to the extent required for enforcement of a Board order after a full hearing on the merits. Nor is the district court required to resolve disputed issues of fact or credibility. Instead, the court's function is limited to a determination of whether such issues could ultimately be resolved by the Board in favor of the petitioner (i.e., the Board's Regional Director). See Balicer v. International Longshoremen's Association, AFL-CIO, 364 F. Supp. 205, 225-226 (D.C.D. N.J., 1973), aff'd., 491 F. 2d 748 (C.A. 3, 1973); San Francisco-Oakland Newspaper Guild v. Kennedy, 412 F. 2d 541, 544 (C.A. 9, 1969); Kennedy v. Sheet Metal Workers International Association Local 108, 289 F. Supp. 65, 91 (D.C.C.D. Cal., 1968), quoted with approval and applied in Wilson v. Milk Drivers and Dairy Employees Union, Local 471, 491 F. 2d 200, 203 (C.A. 8, 1974). Indeed, as this Court has stated, where there are "disputed issues of fact . . ., the Regional Director should be given the benefit of the doubt . . . ."(Seeler v. Trading Port, Inc., supra, 517 F. 2d at 36-37; Accord: Danielson v. International Organization of Masters, Mates and Pilots, supra, 521 F. 2d at 751; Danielson v. Joint Board, supra, 494 F. 2d at 1245), and that even where the proposition of law is unsettled or is one of first impression, "the district court should be hospitable to the views of the /Regional Director/, however novel." Danielson v. Joint Board, supra, 494 F. 2d at 1245. Accord: Danielson v. International Organization of Masters, Mates and Pilots, supra, 521 F. 2d at 751 ("The district court should defer to the statutory construction urged by the Board"). See generally, Squillacote v. Graphic Arts Int'l. Union, AFL-CIO, 540 F. 2d 853, 858 (C.A. 7, 1976).

Since the Board seeks injunctive relief under Section 10(j) and (l) of the Act "in the public interest and not in vindication of purely private rights," I Leg. Hist LMRA, supra, at 414, considerations such as comparative injury, the availability of other remedies at law, and other factors traditionally entering into a balancing of the equities in suits between private parties, which were incorporated into Section 7 of the Norris-LaGuardia Act (29 U.S.C. §107), were specifically rejected by Congress as elements in petitions for injunctive relief under Section 10(j) and (l). See Section 10 (h) of the Act; Muniz v. Hoffman, 422 U.S. 454 (1975); Building and Construction Trades Council of the Metropolitan District, et al. v. Alpert, 302 F. 2d 594, 596-599 (C.A. 1, 1962); Squillacote v. Local 248, Meat & Allied Food Wkrs., supra, 534 F. 2d at 741; In re Union Nacional de Trabajadores, et al., 502 F. 2d 113, 119-120 (C.A. 1, 1974), rehearing granted and judgment reversed on other grounds, 527 F. 2d 602 (1975).

Therefore, the propriety of injunctive relief in Section 10(j) cases turns not upon traditional equity criteria applicable in suits between private parties, but upon the necessity for effectuating the statutory policy. For, where Congress sets the standards for the issuance of injunctions, those standards, and no others, need be satisfied to sustain the prayer for injunctive relief. Douds v. International Longshoremen's Association, 242 F. 2d 808, 811 (C.A. 2, 1957); McLeod v. National Maritime Union of America, AFL-CIO, 457 F. 2d 490, 494 (C.A. 2, 1972); Brown v. Pacific Tel. & Tel. Co., 218 F. 2d 542, 544-545 (C.A. 9, 1955) (concurring opinion). Thus, such relief "is just and proper when the circumstances of a case create a reasonable apprehension that the statutory remedial purposes will be frustrated in the absense

of such relief." Wilson v. Milk Drivers and Dairy Employees Union, supra, 491 F. 2d at 203;[13/] International Union, UAW v. N.L.R.B. (Ex-Cell-O Corp.), 449 F. 2d 1046, 1051 (C.A.D.C., 1971); Angle v. Sacks, supra, 382 F. 2d at 660; N.L.R.B. v. Aerovox Corp., 389 F. 2d 475, 477 (C.A. 4, 1967). See also Brown v. Pacific Tel. & Tel. Co., supra, 218 F. 2d at 544-545 (concurring opinion); Kaynard v. Bagel Bakers Council, 57 CCH Lab. Cas. Para 12,499 (E.D.N.Y., 1968).

While this court has held that traditional criteria for equitable relief are applicable to Section 10(j) and 10(l) proceedings, see McLeod v. General Electric Co., 366 F. 2d 847 (C.A. 2, 1966), vacated as moot and remanded, 385 U.S. 533 (1967),[14/] it has also made clear in subsequent decisions that application of

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13/ Wilson v. Milk Drivers and Dairy Employees Union, supra, involved a proceeding under Section 10(l) of the Act in which that court of appeals reversed the district court's denial of injunctive relief. As noted, supra, p. 14, the standards for injunctive relief are the same under both Sections 10(j) and 10(l), and the court in Wilson v. Milk Drivers quoted its earlier decision in Minnesota Mining & Mfg. Co. v. Meter, supra, a Section 10(j) proceeding.

14/ In the General Electric case, Mr. Justice Harlan granted a stay of the Court of Appeals judgment pending certiorari proceedings initiated by the Board, 87 S. Ct. 5 (1966). He concluded that "in light of the District Court's findings of fact, which were not disturbed by the Court of Appeals, petitioner's position as to /the standards governing the application of Section 10(j)/ cannot be deemed insubstantial." Thereafter, while the case was pending on the petition for certiorari, the company and union bargained and agreed upon a three year collective bargaining agreement to replace the expired contract. The Supreme Court then dissolved the stay granted by Mr. Justice Harlan, granted certiorari, and set aside the judgment of the Court of Appeals with directions to enter a new judgment setting aside the order of the district court and remanding the case to that court for such further proceedings as might be appropriate in light of the supervening event (385 U.S. 533). Thus, while the Supreme Court in General Electric did not decide the proper standard for injunctive relief in 10(j) proceedings, the court indicated by its action when it appeared the case was moot, that it did not intend the decision to stand as precedent. Sears, Roebuck & Co. v. Carpet Layers Union, supra, 397 U.S. 655 (1970); United States v. Musingwear, 340 U.S. 36 (1950).

such criteria is to be "conditioned by the necessities of the public interest which Congress has sought to protect" and that "the standards of public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief in these cases." Seeler v. Trading Port, Inc., supra, 517 F. 2d at 39-40, quoting from Hecht Co. v. Bowles, 321 U.S. 321 (1944). See also Danielson v. Joint Board, supra, 494 F. 2d at 1240-1242.

Moreover, as the court in Angle v. Sacks, supra, recognized, "/S/ection 10(j) relief should /not/ be limited to those emergencies endangering the national welfare, or to situations with 'heavy and meaningful repercussions,' or to situations that have a demonstrably prejudicial impact on the public." Rather, the concern of Congress was that the purposes of the Act "could be defeated in particular cases by the passage of time." Thus, "when the circumstances of a case create a reasonable apprehension that the efficacy of the Board's final order may be nullified, or the administrative procedures will be rendered meaningless, temporary relief may be granted under Section 10(j). Preservation and restoration of the status quo are then appropriate considerations in granting temporary relief pending determination of the issues by the Board." 382 F. 2d at 659-660. Accord: Squillacote v. Local 248, Meat & Allied Food Wkrs., supra, 534 F. 2d at 744. Of course, the status quo which deserves protection under Section 10(j) is that which "existed before the onset of unfair labor practices." Seeler v. Trading Port, supra, 517 F. 2d at 38.

Accordingly, while the district court undoubtedly has the discretion to fashion "just and proper" relief under Section 10(j), this discretion is tempered by the Congressionally imposed duty to formulate interim relief effective to achieve statutory purposes. Seeler v. Trading Port, supra, 517 F. 2d

at 40 ("to further the policies of the Act"). See generally, Compton v. National Maritime Union, 533 F. 2d 1270, 1276-1277 (C.A. 1, 1976). And, unlike in litigation between private parties, the court's discretion in proceedings under Section 10(j) is further qualified by the Congressional policy favoring the granting of such injunctive relief, Wilson v. Milk Drivers, supra, 491 F. 2d at 204 and cases there cited, since any court issuing injunctive relief under any federal statute must exercise its discretion in light of the larger objectives of that statute. In sum, as Judge Pope observed in his concurring opinion in Brown v. Pacific Telephone and Telegraph Co., supra, 218 F. 2d at 544-545, where the Ninth Circuit reversed a judgment of a district court denying an injunction under Section 10(j):

> . . . since this injunction is sought for the protection of the public interest and in aid of a policy which Congress itself has made plain, the area for the exercise of the traditional discretion not to grant an injunction is much more limited. As stated with respect to a somewhat comparable situation in Hecht Co. v. Bowles, 321 U.S. 321, 331, 64 S. Ct. 587, 592, 88 L. Ed. 754; "For the standards of the public interest not the requirements of private litigation measure the propriety and need for injunctive relief in these cases." Cf. Virginia Ry. Co. v. System Federation, 300 U.S. 515, 552, 57 S. Ct. 592, 81 L. Ed. 789.

With respect to appellate review of 10(j) proceedings, this Court has held that the district court's legal conclusions are reviewable under the standard of whether they are "correct" and that its exercise of discretion in fashioning a "just and proper" remedy is reviewable under the standard of whether the district court abused its discretion. Danielson v. Joint Board, supra, 494 F. 2d at 1244, n., 22 quoting from Boire v. International Brotherhood of Teamsters, supra, 479 F. 2d at 793.

We now show that in the circumstances of this case, the district court's denial of the broad order requested by the Regional Director was based upon incorrect legal conclusions and was not a valid exercise of the court's dis-

cretion since the narrow order issued by the court is demonstrably ineffective to provide the interim relief for which Section 10(j) of the Act was specifically designed.

II. THE COURT BELOW COMMITTED REVERSIBLE ERROR IN FAILING TO ORDER THE JOINT BOARD TO REOPEN THE DENTAL CLINIC, REINSTATE THE DISCHARGED EMPLOYEES OF THE DENTAL CLINIC, AND RECOGNIZE AND BARGAIN WITH THE UNION

In petitioning the court below for injunctive relief pursuant to Section 10(j) of the Act, the Regional Director alleged, inter alia, that there was reasonable cause to believe that the Joint Board, through its agents, interrogated dentists with respect to their Union membership and activities, harassed them because of their activities on behalf of the Union by subjecting them to stricter and closer supervision and by accusing them of engaging in "sabotage", and told them that selecting the Union would be a futile act, all in violation of Section 8(a)(1) of the Act; that the Joint Board discharged all of the dentists in the dental clinic, and closed the clinic because the dentists designated the Union as their collective bargaining representative, in violation of Section 8(a)(3) of the Act; and that the Joint Board unlawfully refused to bargain with the Union, in violation of Section 8(a)(5) of the Act. Based on the entire record, the court below concluded that there was reasonable cause to believe that the Joint Board engaged in the conduct alleged.[15/]

15/ Inasmuch as the Board has appealed from the district court's order only insofar as it denied the specific interim relief requested and the Joint Board has not appealed from the district court's finding of reasonable cause, that finding is not at issue before this Court. N.L.R.B. v. International Van Lines, 409 U.S. 48, 52, n. 4 (1972); Morely Construction Co. v. Maryland Casualty Co., 300 U.S. 185, 191 (1937); Whitehead v. Ameri-

(Continued on p. 22)

However, in fashioning the injunctive relief granted in the instant case, the court below erroneously concluded that it had no authority to enter an interim bargaining order prior to the issuance by the Board of a final remedial order directing bargaining (A. 29). This unexplained legal conclusion is directly contrary to this Court's recent decision in Seeler v. Trading Port, Inc., supra.

Just as the Supreme Court has stated that a cease and desist order is an inadequate final remedy in a situation where an employer refuses to recognize a majority union and then proceeds to commit independent unfair labor practices of such seriousness that they "tend to undermine the union's majority status and impede the election process", N.L.R.B. v. Gissel Packing Co., Inc., 395 U.S. 575, 612 (1969), so this Court has concluded in Trading Port that a cease and desist order may also be insufficient interim relief in such cases. Seeler v. Trading Port, Inc., supra, 517 F. 2d at 37. As this Court pointed out (Ibid.);

> If an employer faced with a union demand for recognition based on a card majority may engage in an extensive campaign of serious and pervasive unfair labor practices, resulting in the union's losing an election, and is then merely enjoined from repeating those already successful violations until final Board action is taken, the Board's adjudicatory machinery may well be rendered totally ineffective.
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> * * *
>
> Only if the district courts may issue interim bargaining orders can the union's viability be maintained to the degree necessary to make final Board adjudication in the form of an election or a bargaining order meaningful.

15/ Cont'd. can Security and Trust Company, 285 F. 2d 282, 286 (C.A.D.C., 1960); Mills v. Long Island Rail Road Company, 515 F. 2d 181, 184 (C.A. 2, 1975); Terkildsen v. Waters, 481 F. 2d 201, 205-206 (C.A. 2, 1973); Benenson v. United States, 385 F. 2d 26, 29 (C.A. 2, 1967); Haffa v. United States, 516 F. 2d 931, 933, n. 3 (C.A. 7, 1975).

Hence, "it is essential not to freeze the present /illegal/ situation, but rather to 'reestablish the conditions as they existed before the employer's unlawful campaign.'" Id. at 38.

Accordingly, the Court held that (Id. at 40):

> when the Regional Director makes a showing, based on authorization cards, that the union at one point had a clear majority and that the employer then engaged in such egregious and coercive unfair labor practices as to make a fair election virtually impossible, the district court should issue a bargaining order under §10(j). In such a case the election process has been rendered so meaningless by the employer, that the authorization cards are a clearly superior gauge of employee sentiment. A bargaining order then becomes a just and proper means of restoring the pre-unfair labor practice status quo and preventing further frustration of the purposes of the Act.

As shown in the Statement of Facts, supra, p. 7, in the instant case the Union obtained authorization cards from 21 of the 30 dentists in the unit,[16/] a clear majority. Thereafter the Union demanded that the Joint Board recognize and bargain with it as the exclusive bargaining representative of the dentists. The Joint Board refused to accede to this request and, immediately thereafter, proceeded to engage in a series of "egregious and unlawful" unfair labor practices, commencing with unlawful interrogations, harassment and unusual oversight of the dentists' work, and culminating in the unlawful, discriminatory closing of the dental clinic and the discharge of all the bargaining unit employees and virtually all of the clerical employees.

Thus, in the short space of one and one-half months, the Joint Board's flagrant and deliberate conduct has succeeded not merely in dissipating the Union's majority status in the unit, but in entirely eliminating the unit.

16/ One of the 21 dentists who signed an authorization card has since died.

Indeed, there may be no more egregious violation than the unlawful closing of a portion of an operation because of the employees' organizational activities and the discharge of all the employees. For, as here, the discharges and closing unequivocally demonstrated to the employees that the Joint Board will take any and all steps necessary to prevent the Union from representing the dentists, regardless of its effect on the employees or the beneficiaries of the benefit plan. Clearly, this virulent, antiunion conduct by the Joint Board rendered a fair election impossible.[17/]

Consequently, we submit that entry of an interim order requiring the Joint Board to recognize and bargain with the Union is fully warranted and necessary to restore the status quo which existed before the onset of the Joint Board's unfair labor practices; to prevent the final Board order from being ineffectual; and to assure the free flow of commerce. The Joint Board's unrestrained, continued refusal to bargain with the Union during the prolonged period required for the completion of the administrative processes and issuance of a final Board order would not only impair the practice of orderly collective bargaining and perpetuate the interruption of dental care to the individuals covered by the benefits administered by the Joint Board, but also threatens to irreparably harm the Union's bargaining position once negotiations finally take place. For, as the Supreme Court has observed, "/t/he refusal of any employer to bargain collectively with its employees' chosen representative disrupts the

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17/ Cf. Serv-U-Stores, Inc., 225 NLRB No. 7, 93 LRRM 1033 (1976); John C. Carey Milling Company, 218 NLRB 916 (1975); Plastics Transport, Inc., 193 NLRB 54 (1971).

employees' morale, deters their organizational activities, and discourages their membership in unions." Franks Bros. Co. v. N.L.R.B., 321 U.S. 702, 704 (1944). Accord: Seeler v. Trading Port, Inc., supra, 517 F. 2d at 38; Brown v. Pacific Telephone and Telegraph Company, supra, 218 F. 2d at 544. By the time the Board's procedures are completed and a bargaining order issues, the Union's support will be so depleted as a result of the Joint Board's unfair labor practices that the Union will be deprived of the ability to bargain effectively on behalf of the employees. Seeler v. Trading Port, Inc., supra, 517 F. 2d at 38.

Accordingly, not only was the court below incorrect in concluding that it did not have the authority to issue an interim bargaining order, but it was also incorrect in failing to obey the direction of this Court that an interim bargaining order should issue when, after a union attains majority support, an employer engages in such egregious unfair labor practices that a fair election becomes virtually impossible. 18/

18/ In Boire v. Pilot Freight Carriers, Inc., 515 F. 2d 1185 (C.A. 5, 1975), the Fifth Circuit refused to issue an interim bargaining order where, after the Union attained majority status, the Employer engaged in substantial unfair labor practices. A petition for rehearing was denied by the Fifth Circuit. 521 F. 2d 795. After a petition for certiorari was filed, the Board's decision on the merits of the underlying unfair labor practices issued on March 25, 1976 (223 NLRB No. 41, 92 LRRM 1246), rendering the 10(j) injunctive proceedings moot. On June 14, 1976, the Supreme Court denied certiorari with respect to the Fifth Circuit 10(j) proceeding. ___ U.S. ____, 92 LRRM 2768 (1976). The reasoning of the Fifth Circuit is completely contrary to this Court's decision in Trading Port, and, we submit, is incorrect.

The court below also committed reversible error in failing to order the Joint Board to reopen the dental clinic and reinstate the discharged employees pending the final adjudication by the Board. Since the lower court incorrectly concluded that it had no authority to issue an interim bargaining order, absent an outstanding final Board order, it did not consider the question whether the Joint Board should be required to reopen the clinic and reinstate the employees within the proper legal framework, i.e., in light of the fact that issuance of an interim bargaining order was clearly both "just and proper" and necessary to fulfill the statutory purposes.

Issuance of an order requiring the Joint Board to reopen the dental clinic and to reinstate the discharged dentists is essential to ensure that an interim bargaining order will provide meaningful relief.[19/] Any negotiations occurring while the clinic remains closed and the dentists unemployed obviously would be of precious little value either to the dentists or the Union. At best, the Union would be limited to bargaining for the reopening of the clinic and reinstatement of the dentists. And, in such negotiations, the Union would have virtually no leverage.

19/ The dental clinic employees should also be reinstated to fully effectuate the reopening of the dental clinic and the resumption of the dental clinic operations. Cf. N.L.R.B. v. Dorn's Transportation Company, 405 F. 2d 706, 713 (C.A. 2, 1969); Wonder State Mfg. Co. v. N.L.R.B., 331 F. 2d 737 (C.A. 4, 1964); N.L.R.B. v. Suprex Drugs, Inc., 341 F. 2d 747 (C.A. 6, 1965).

A reopening and reinstatement order is also necessary to prevent a frustration of the ultimate administrative action, i.e., the Board's issuance of an order requiring reopening, reinstatement, and bargaining. See Angle v. Sacks, supra, 382 F. 2d at 661. See also Smith v. Old Angus, Inc., 81 LRRM 2936 (D. Md., 1972); Davis v. R.G. LeTourneau, Inc., 340 F. Supp. 882 (E.D. Tex., 1971); Reynolds v. Curley Printing Company, Inc., 247 F. Supp. 317 (M.D. Tenn, 1965); Potter v. United Foods, Inc., 58 LRRM 2469 (S.D. Tex., 1965); Elliott v. Dubois Chemicals, Inc., 201 F. Supp. 1 (N.D. Tex., 1962), 49 LRRM 2238 (N.D. Tex., 1961). Cf. Samoff v. Philadelphia Newspaper Printing Pressmen's Union No. 16, 304 F. Supp. 667 (E.D. Pa., 1969).[20/]

A failure to grant the requested interim relief would greatly enhance the possibility that the discharged employees would secure new employment, retire, or move out of the geographic area prior to the issuance of a Board order. If this occurred, by the time the Board issues an order requiring

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20/ In Boire v. Pilot Freight Carriers, Inc., supra, 515 F. 2d at 1193, the Fifth Circuit refused to order the reinstatement of two unlawfully discharged employees because the discharges had already had their effect on the organizational effort as a result of the time delay in seeking 10(j) relief. Such reasoning is clearly contrary to this court's view of "just and proper" as restoring the status quo prior to the onset of the unfair labor practices and is contrary to this court's decision in Seeler v. Trading Port, Inc., supra, 517 F. 2d 33. In Trading Port, this court recognized that the unfair labor practices, which included unlawful discharges, precluded the holding of a fair election and, therefore, issued an interim bargaining order. Thus, while reinstatement alone may not alleviate the injury to the Union's organizing campaign, reinstatement plus an interim bargaining order will.

reinstatement and bargaining, few of the discriminatees would be available and willing to accept reinstatement, rendering the Board's order ineffective. See Elliott v. Dubois Chemicals, Inc., supra, 201 F. Supp. at 3. The Joint Board would, therefore, profit from its own wrongful conduct. See Franks Bros. Co. v. N.L.R.B., supra, 321 U.S. at 704. Moreover, even if all or most of the discharged dentists accepted reinstatement following a final Board order, their allegiance to the Union predictably would be substantially or totally dissipated as a result of the prior discharge, unremedied during the entire period of the Board's unfair labor practice proceedings. Rather than risk further retribution at their employer's hands, the dentists might well reject Union representation.

In short, both an interim bargaining order and an order requiring the reopening of the dental clinic and the reinstatement of the dental clinic employees is necessary to "reestablish the conditions as they existed before the employer's unlawful campaign" and to preserve the efficacy of the Board's final order. Seeler v. Trading Port, Inc., supra, 517 F. 2d at 38.[21/]

Finally, in refusing to order reinstatement and reopening, the district court improperly relied primarily on the fact that the Joint Board had recently been losing money (A. 29-30). By simply balancing the comparative injuries in

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21/ An interim reinstatement order would also eliminate the chilling effect of the discriminatory shutdown of the dental clinic upon the remaining employees of the Joint Board. Cf. Darlington Mfg. Co. v. N.L.R.B., 397 F. 2d 760 (C.A. 4, 1968), on remand from 380 U.S. 263, cert. denied 393 U.S. 1023 (1969); George Lithograph Company, 204 NLRB 431 (1973).

this case, without giving appropriate weight to the overriding public interest, the district court applied an incorrect standard for determining the "just and proper" injunctive relief. As shown above, supra, p. 17, the comparative injury test, although included in the Norris-LaGuardia Act, was specifically rejected by the Congress as a consideration in proceedings under Section 10(j) and 10(l) of the Act. As further shown, this Court has stated that, at a minimum, the traditional criteria for equitable relief must be conditioned by the public interest which Congress sought to protect. We submit that where mass discharges result from employees' union organizational activities, the public interest clearly calls for the reinstatement of the discharged employees, thereby restoring the status quo as it existed prior to the onset of the unfair labor practices, terminating the industrial unrest resulting therefrom, and advancing the practice of collective bargaining. See Angle v. Sacks, supra; I Leg Hist. LMRA, supra, at 414.

CONCLUSION

In view of all of the foregoing, we submit that an order requiring the Joint Board to reopen the dental clinic, reinstate the discharged employees and recognize and bargain with the Union is "just and proper" in the circumstances of this case and that, in denying such interim relief, the district court acted from a misconception of the state of the law and committed clear reversible error. Accordingly, the decision of the court below should be

reversed insofar as it denies the above requested relief and the case remanded for entry of an order granting such relief.

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NOVEMBER, 1976

STATUTORY APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, et seq.) are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. * * *.

* * *

UNFAIR LABOR PRACTICES

Sec. 8(a) It shall be an unfair labor practice for an employer --

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; * * *

* * *

(3) By discrimination in regard to hire or tenure of employment or any term or any term or condition of employment to encourage or discourage membership in anylabor organization: * * *

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Section 10

(j) The Board shall have power upon issuance of a complaint in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

* * *

NC. 76-6156

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SAMUEL M. KAYNARD, REGIONAL DIRECTOR OF REGION 29 OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,

Petitioner-Appellant,

v.

JOINT INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY AND PENSION COMMITTEE, JOINT INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY, AND TRUSTEES OF THE PENSION HOSPITALIZATION AND BENEFIT PLAN OF THE ELECTRICAL INDUSTRY, AS NAMED IN APPENDIX A,

Respondent-Appellee.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 26, 1976, two copies of the Brief for Petitioner-Appellant and of the Joint Appendix in the above-captioned case were duly mailed in a government franked envelope to Irwin Geller, Esquire, Menagh, Trainor and Rothfeld, 130 East 40th Street, New York, New York 10016, Counsel for Respondent-Appellee.

Milford R. Limesand
Deputy Assistant General Counsel
National Labor Relations Board

Dated at Washington, D.C.
this 26th day of November, 1976